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SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 990.

NATIONAL BISCUIT COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal From the Supreme Court of Pennsylvania.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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This Brief will be directed only to the Statement by Appellee of the Question Presented,[1] and to its first argument.[2] The other arguments of Appellee have been anticipated and answered in Appellant's Jurisdictional Statement.

1. The Statement by Appellee of the Question Presented Is Incomplete, Inaccurate, and Misleading.

Appellee's statement ignores the fundamental issue in this Appeal.[3] This issue is whether the irreconcilable, incon-

1. Motion to Dismiss or Affirm, p. 5.
2. Motion to Dismiss or Affirm, pp. 8, 9.
3. Appellant's first question; Jur. St., pp. 4; 14-15.

sistent decisions of the State court as to the nature of the State Franchise Tax, concurrently enforced, discriminate per se against United States securities owned by Appellant. Appellee's entire Motion to Dismiss or Affirm seeks to limit this court's consideration of the present appeal to the collateral issue of due process, which in turn is based by Appellee upon its inaccurate and misleading statement that the majority decision by the State court in *National Biscuit Co. v. Phila.*,[4] holding the Franchise tax to be a property tax, is mere dictum.

The majority of the State court in that case based its decision upon an unqualified ruling that the Franchise tax is a property tax. The minority dissenting opinion of Justices Bell and Musmanno in that case [5] and the minority concurring opinion of Justices Bell, Musmanno and Jones in the present case [6] expressly stated that this was not dictum, but was the very foundation of the majority decision in the Philadelphia case. The concurring minority opinion also points out that the decisions of the majority holding the State Franchise tax to be both a property tax and an excise tax are irreconcilable; and that the "property tax" decisions must be overruled if the Court is to hold that Franchise tax is an excise tax.[7] Therefore, Appellee's statement of the Question Presented is inaccurate and misleading.

The more important situation presented to this Court in the present case is the *simultaneous concurrent enforcement of irreconcilable decisions* by a majority of the State Court holding the State Franchise Tax to be *both* a *property* tax (*National Biscuit Co. v. Philadelphia*) *and* an *excise tax* (present case); and the effect of these irreconcil-

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4. 374 Pa. 604, 98 A. 2d 182 (1953).

5. Jurisdictional Statement, Appendix D, pp. 74, 75.

6. 390 Pa. 642, 136 A. 2d 821 (1957), Jurisdictional Statement, Appendix B, pp. 46, 49.

7. Jurisdictional Statement, Appendix B., p. 49.

able decisions on the immunity of U. S. securities from state taxation.

On this phase of the case, Appellee's presentation of the Question Presented is completely silent and therefore is incomplete and inadequate. It totally ignores the question, raised from the very beginning by Appellant, that its U. S. securities are not subject to tax under the Credit Clause and the Equal Protection Clause of the U. S. Constitution and under R. S. 3701.

It is true that this question was rephrased from time to time to meet the changing positions of the state courts as they developed; but the basic question of immunity of U. S. securities was always and still is at issue.

2. The Four Questions Presented by Appellant [8] Were Properly Raised and Are Substantial.

When appellant filed its Appeal and Specification of Objections in the Dauphin County Court on April 14, 1954,[9] the decision by a majority of the State Court in *National Biscuit Co. v. Philadelphia,* holding the State Franchise tax to be a property tax,[10] was the latest pronouncement of that court as to the nature of the Franchise Tax. Appellant's pleadings in the trial court were naturally pointed to that decision. Appellant's second, third and fourth questions [11] were raised in Paragraphs 14(2) and 14(3).[12] of the Appeal and Paragraphs 14(2)(a) and (b) and 14(3)(g) thereof [13] can be construed reasonably to anticipate and raise its first question.

It would seem that Appellee's argument [14] is that Appellant's first question, to wit, that the conflicting state

8. Jurisdictional Statement, pp. 4, 5.
9. Record to the Supreme Court of Pennsylvania, p. 1a.
10. 374 Pa. 604, 98 A. 2d 182 (June 26, 1953).
11. Jurisdictional Statement, pp. 4, 5.
12. Record to the Supreme Court of Pennsylvania, pp. 7a, 8a, 9a, 10a; see, also, Jurisdictional Statement, pp. 11, 12, 13.
13. Record to the Supreme Court of Pennsylvania, pp. 8a, 10a.
14. Motion to Dismiss or Affirm, pp. 8, 9.

court decisions per se impinge on federal sovereignty, was not stated in exactly the same language in the pleadings before the trial court. This raises the serious issue whether Appellant is required to anticipate in all the nuances of its pleadings that the decisions of the state courts in the present case would not follow, but would be contrary to *National Biscuit Co. v. Philadelphia,* and furthermore would, for the first time, openly and expressly attempt to retain in force and effect conflicting theories as to the nature of the tax. It is submitted that any such requirement would be arbitrary and unreasonable. The nub of appellant's first question is that the assertion by the majority of the State Court of its power and right to hold the Franchise tax to be simultaneously and concurrently both a *property* tax and an *excise* tax, depending upon the exigencies of the particular case, constitutes *per se* a discrimination against United States securities owned by appellant. The underlying issue involved was presented at every stage of the litigation.

Appellant presented its first question, in form responsive to the developing and changing positions of the state courts, in its 3rd, 4th, 7th, 25th, 26th, 27th, 28th, 29th and 33rd Exceptions to the Opinion and Judgment Nisi of the Dauphin County Court;[15] in its "Statement Served on Lower Court under Rule 43";[16] in its Questions to the Supreme Court of Pennsylvania (See Copy of its Brief to that Court filed with this Court p. 1); and in its Petition for Reargument.[17]

Appellant submits, therefore, that the four questions presented in its Jurisdictional Statement were sufficiently raised; were considered by the State Court; and present substantial Federal questions.[18]

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15. Record to Supreme Court of Pennsylvania, pp. 141a, 142a, 143a, 150a, 151a, 152a, 154a.
16. Record Supreme Court of Pennsylvania, pp. 158a, 159a.
17. Jurisdictional Statement, Appendix C, pp. 50-61.
18. Jurisdictional Statement, pp. 13-19.

3. Conclusion.

It is respectfully submitted that this Court has Jurisdiction of this Appeal for the reasons set forth herein and in its Jurisdictional Statement; and that the Motion to Dismiss or Affirm should be denied.

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